SUPREME COURT, U.S.
FILED
JUN 17 1958
JOHN T. FEY, Clerk

No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1957

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Public Service Commission of Utah and Utah Citizens Rate Association,

v.

United States of America and Interstate Commerce Commission,
The Denver and Rio Grande Western Railroad Company,
Union Pacific Railroad Company,
Southern Pacific Company,
The Western Pacific Railroad Company,
Utah Railway Company,
Bamberger Railroad Company,
Tooele Valley Railway Company,
Salt Lake, Garfield and Western Railway Company,
The Ogden Union Railway and Depot Company.

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PETITION FOR REHEARING

o——o——o

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STATUTE CITED:

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Union Pacific Railroad Company,
Southern Pacific Company,
The Western Pacific Railroad Company,
Utah Railway Company,
Bamberger Railroad Company,
Tooele Valley Railway Company,
Salt Lake, Garfield and Western Railway Company,
The Ogden Union Railway and Depot Company.

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PETITION FOR REHEARING

o———o———o

The railroads named above respectfully petition the Court, pursuant to Rule 58, for a rehearing in the above-entitled cause, and for reconsideration of the Court's 5 to 4 decision of May 19, 1958, setting aside an order of the Interstate Commerce Commission issued under Section 13(3) and (4) of the Interstate Commerce Act, requiring the railroads operating in Utah to increase their intrastate freight rates and charges (with certain exceptions) in Utah so as to remove unjust discrimination against interstate commerce.

We are thoroughly aware that this Court very rarely grants a petition for rehearing and then only in unusual or unique circumstances (Supreme Court Practice, Second Edition, by Stern and Gressman, page 351). However, we are confident that the grounds of this petition present circumstances of such unusual, unique and unprecedented nature as to impel rehearing and reconsideration of the majority opinion. In reaching its decision the majority, we submit, was clearly misled by or did not comprehend that in order to arrive at the low Utah intrastate operating ratio and high intrastate traffic density, accepted by the majority, the Utah commission, without so informing the Court, used its own false-labeled "intrastate statistics", which included not only intrastate traffic but also interstate traffic more than five times the volume of the intrastate traffic. Thus, the Utah commission, with inadvertent approval of the majority of the Court, falsely credits the Utah intrastate traffic with more than five times its actual density, and, by including revenues from *all interstate traffic* moved in and through Utah, the Utah commission falsely represents that its intrastate traffic and rates produced more than five times the revenues actually derived from them.

Surely, the majority of the Court would not knowingly and intentionally espouse a formula requiring that in testing their validity under Section 13, intrastate rates and traffic must be credited with, and considered as having produced all of the net ton miles and all of the revenues derived by the carriers from *all* traffic—interstate as well as intrastate—that moved within, to, from and across a state. Under such a false formula, every state in the United States could always show that its intrastate rates never discriminate against interstate commerce, but

contribute several times their fair share to over-all revenues needed to maintain the national railway system, since they would be credited with several times the revenues they actually produce.

The 5 to 4 decision makes abrupt, unexplained but apparently rigid, rulings of such far-reaching importance and which so far depart from, conflict with, or reverse rulings established by a long and undeviating line of this Court's decisions with respect to the nature, scope and probability of evidence required to support a Commission order under Section 13 of the Act, as to leave in doubt, conflict and chaos the status of the law governing Section 13 proceedings and practically to defeat the legislative purpose, and deprive the railroads of the benefits of that Section.

We will endeavor to state briefly and distinctly the separate grounds of this petition at the beginning of and in connection with our discussion of each of the separate grounds upon which rehearing is sought.

I.

As the Utah Commission's False-Labeled "Intrastate Statistics" Commingled and Included Interstate Revenues and Net Ton Miles of Interstate Traffic That Exceeded by More Than Five Times the Utah Intrastate Revenues and Net Ton Miles, Those Statistics Were Without Any Probative Force Whatever, and Afforded no Basis for the Finding in the Majority Opinion That Those Statistics Indicated "That Intrastate Traffic Moved at Lower Cost Than Interstate" and Were Convincing Evidence of "Greater Density on Intrastate Operations" and "Lower Operating Ratios and Higher Returns" on Intrastate Traffic, nor for the Majority Opinion That the Commission's Order Must be Set Aside for Lack of Substantial Evidence.

The conclusion of the majority of the Court that the Commission's order is invalid clearly results from the majority's unqualified acceptance and the results obtained from the application of false-named and deceptive data submitted in evidence by the Utah commission in its Exhibit No. 64 (R. 548), headed "Intrastate Statistics", which attempts to compare what purports to be the operating ratios of four Utah railroads in handling Utah intrastate traffic, and "density" of Utah intrastate traffic with system-wide operating ratios and traffic densities of those four roads. We confidently believe that the Utah commission has misled and deceived the majority of the Court by using the commingled and false-named "intrastate statistics" to produce the erroneous results which led the majority to the conclusion that the order must be set aside.

The question involved in a proceeding under Section 13(3) and (4) of the Act is whether—

> "* * * any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State"

causes any undue prejudice against persons or localities in interstate commerce or any "unjust discrimination against interstate or foreign commerce." Hence, any attempt to test the lawfulness of the Utah intrastate rates by comparing operating ratios resulting from the handling of traffic in Utah or the density of the state traffic with "system statistics" must be limited to actual intrastate traffic moved "wholly within" Utah (Section 1(2)(a) of the Act) under intrastate rates "made or imposed by authority" of the Utah commission.

But, as pointed out at pages 86-87 of the brief filed by these railroads in this Court and at page 21 of the Government's brief, the fatal defect in the mis-named "intrastate statistics" submitted by the Utah commission in Exhibit No. 64 is that those statistics are not limited to intrastate traffic revenues or expenses but, as frankly stated by that commission's witness, include not only intrastate traffic but also *all interstate traffic* moving to and from Utah and all "bridge" traffic moving across Utah. Obviously, there is no valid or rational basis for a claim that the intrastate rates and traffic produced any part of interstate revenues, or for including interstate revenues in arriving at an operating ratio for handling intrastate traffic, or interstate net ton miles in arriving at the "density" of intrastate traffic. Indeed, the states' rules governing the preparation of annual reports to the state commissions say (R. 306)

> "1. Eac[h] State is *credited* with all revenues derived from its *intrastate* traffic," although the rules require an apportionment of interstate revenue to the states. (Italics added.)

This basic defect which obviously stripped those mis-named "intrastate statistics" of any relevancy or probative effect whatever, must, we confidently believe, have been overlooked or its vitiating effect not understood by the majority, but it is established beyond possible doubt in the following testimony of the Utah commission's witness at page 293 of the record:

"Q. Now to begin with, Mr. Crandall, the heading on Exhibit No. 64, on the left hand side, reads 'Intrastate Statistics'?

"A. Yes.

"Q. Now it is a fact is it not, that that includes both interstate and intrastate traffic in Utah?

"A. That is correct.

"Q. So that it isn't intrastate in the sense of movements?

"A. Meaning that it is interstate and intrastate movements within the State of Utah.

"Q. Now all bridge traffic, moving across the state of Utah, that has neither origin or destination in Utah, is included in those statistics, in the left half of Exhibit No. 64?

"A. That is correct."

To the Commission and others having knowledge of and familiarity with reporting methods and railroad statistics, the fact alone, admitted by the Utah commission's witness, that the mis-named "intrastate statistics" included and commingled revenues, etc., from both interstate and intrastate traffic was sufficient completely to strip them of any probative force whatever, and to require their rejection. Hence, the Commission mentioned,

but did not dwell at length on this false method employed by the Utah commission in arriving at low operating ratios and high traffic densities for Utah intrastate traffic but, as stated in the majority opinion, rejected the result obtained from application of these false figures, saying (R. 115)—

> "* * * [o]ne of the principal objections to the density figures above shown is that they were obtained by using only the miles of main track. The density results would be substantially reduced if branch-line mileage were included. The comparisons thus made are of little significance in our determination here. A more important consideration is the positive showing made upon this record that the average unit expense of servicing Utah intrastate traffic is at least as great as that of servicing interstate traffic to and from Utah."

Nor does the majority opinion take cognizance of the false results necessarily flowing from commingling and including both intrastate and all interstate traffic moving in Utah in an attempt to lower the operating ratios and to increase the density of actual Utah intrastate traffic. If it had done so, we feel certain that the majority would never have held the Commission's order invalid for lack of substantial evidence in the particulars mentioned in the majority opinion.

We will now endeavor to demonstrate the inescapably false and fantastic results produced by the figures and methods used by the Utah commission, and the consequent error of the majority in accepting and relying upon the Utah commission's figures and the results obtained from applying them. The annual reports of the railroads to the Utah commission, to which the majority

opinion refers, are required to and do state separately the amount of revenue earned from hauling intrastate traffic within Utah, and the amount of revenue they earn from hauling interstate traffic to, from and across Utah, apportioned as required by the Utah commission "on the basis of the mileage traversed (in Utah) by the individual passenger or the individual shipments" (R. 306). In compiling Exhibit No. 64, the witness for the Utah commission significantly failed to show separately the intrastate and the apportioned interstate revenues as they are separately shown in the reports, but merely added the revenues from actual Utah intrastate freight traffic, and the revenues from the apportioned interstate freight traffic, and showed the intermingled total as Utah "intrastate" revenues. Total operating expenses are shown in Exhibit 64 and in the annual reports, as required by the Utah commission, on the basis of train mileage in Utah (R. 306), with no separate showing of expense of handling intrastate and interstate traffic. From this intermingling of revenue and expense involved in handling Utah intrastate traffic with apportioned revenue and expense involved in handling interstate traffic to, from and across Utah, the witness calculated what he claimed to be an "operating ratio" of the Utah railroads in handling Utah intrastate freight traffic.

To make a specific demonstration of the falsity of the figures relied upon by the Utah commission and the majority of the Court, and the egregious error in giving them any probative effect at all: Exhibit No. 64 shows Union Pacific's Utah intrastate freight revenue as $51,243,557 for 1953, but the Union Pacific's annual report to the Utah commission for 1953 (see photocopy, page 700 of that report, page 9) shows that of this total intermingled intrastate and interstate revenue, only

U.P.R.R. Co

710. RAILWAY OPERATING REVENUES EARNED WITHIN THE STATE

Utah

(For roads making operating reports)

State the railway operating revenues of the respondent for the year (classified in accordance with the Uniform System of Accounts for Steam Railroads), and the comparison of such revenues with those of the preceding year (showing increases in black and decreases in red) for each of the several classes. The proportion of joint traffic receipts belonging to other carriers should not be included in column (b).

Line No.	Class of railway operating revenues (a)	Total amount of revenue for the year (b)	Comparison with total revenue of preceding year. (Increase in black, decrease in red) (c)	Revenues Earned Within the State: On intrastate traffic (d)	On interstate traffic (e)	Total (f)
		$	$	$	$	$
1	I. TRANSPORTATION—RAIL LINE					
2	(101) Freight			8 732 991	42 511 466	51 243 557
3	(102) Passenger			29 753	3 705 270	3 735 023
4	(103) Baggage			2 864	14 082	16 946
5	(104) Sleeping car				101	101
6	(105) Parlor and chair car					
7	(106) Mail			80 200	1 256 169	1 336 369
8	(107) Express				500 560	500 560
9	(108) Other passenger-train			115	10 884	10 999
10	(109) Milk			3 056	9 204	12 260
11	(110) Switching	Data for columns (b) and (c) not required			461 236	461 236
12	(113) Water transfers—Freight					
13	(114) Water transfers—Passenger					
14	(115) Water transfers—Vehicles and livestock					
15	(116) Water transfers—Other					
16	Total rail-line transportation revenue			8 848 079	48 468 972	57 317 051
17	III. INCIDENTAL					
18	(131) Dining and buffet				448 122	448 122
19	(132) Hotel and restaurant				206 183	206 183
20	(133) Station, train, and boat privileges				12 041	12 041
21	(134) Parcel room				597	597
22	(135) Storage—Freight				1 078	1 078
					1 737	1 737

5	(104) Sleeping car													101				101
6	(105) Parlor and chair car																	
7	(106) Mail										80	200	1	256	169	1	336	369
8	(107) Express													500	560		560	560
9	(108) Other passenger-train											115		10	884		10	999
10	(109) Milk										3	056		9	204		12	260
11	(110) Switching				Data for columns (*b*) and (*c*) not required									461	236		461	236
12	(113) Water transfers—Freight																	
13	(114) Water transfers—Passenger																	
14	(115) Water transfers—Vehicles and livestock																	
15	(116) Water transfers—Other																	
16	Total rail-line transportation revenue								8	848	079	48	468	972	57	317	051	
17	III. INCIDENTAL																	
18	(131) Dining and buffet													448	122		448	122
19	(132) Hotel and restaurant													206	183		206	183
20	(133) Station, train, and boat privileges													12	041		12	041
21	(134) Parcel room														597			597
22	(135) Storage—Freight													1	078		1	078
23	(136) Storage—Baggage													1	737		1	737
24	(137) Demurrage													53	990		53	990
25	(138) Communication													12	001		12	001
26	(139) Grain elevator																	
27	(141) Power														571			571
28	(142) Rents of buildings and other property													44	569		44	569
29	(143) Miscellaneous													80	700		80	700
30	Total incidental operating revenue													861	589		861	589
31	IV. JOINT FACILITY																	
32	(151) Joint facility—Cr													43	551		43	551
33	(152) Joint facility—Dr													13	251		13	251
34	Total joint facility operating revenue													30	300		30	300
35	Total railway operating revenues								8	848	079	49	360	861	58	208	940	

$8,732,091 was revenue derived from actual intrastate traffic moved "wholly within" Utah, and that $42,511,466 (or about 5 times the revenue from intrastate traffic) was revenue from interstate traffic moved on interstate rates to, from or across Utah during 1953. Thus, the Union Pacific's revenue from actual intrastate traffic was only 17.04% of the total revenue of $51,243,557, while the apportioned revenue from interstate traffic was 82.96% of the total intermingled revenue stated in Exhibit 64.

The total intermingled intrastate and interstate revenues shown as required by the Utah commission in Union Pacific's annual reports for the four-year period used in Exhibit 64, was $186,728,771, of which only $29,128,390, or 15%, was revenue from actual intrastate traffic, and $157,600,381, or 85%, was revenue from interstate traffic that moved to, from or across Utah. Thus, the Utah commission falsely inflates by more than *five times* the revenue produced by Utah intrastate rates during the four-year period.

The misnamed "intrastate" traffic density figures in Exhibit 64, are, likewise, falsely inflated by intermingling and adding to the actual intrastate net ton miles of traffic, the net ton miles of interstate traffic which produced 85% of the total revenue shown as required by the Utah commission as "earned within the State" by the Union Pacific. Since true revenue (as distinguished from arbitrarily apportioned or allocated, as the Utah commission requires) is directly related to net ton miles, it results that what purports to be the total Utah intrastate traffic density shown in Exhibit No. 64 for the Union Pacific in 1953 was composed of about 15%, or only 772,269 net ton miles, of intrastate traffic and 85%, or 4,376,192 net ton miles of interstate traffic.

The complete fallacy of testing or determining the question whether intrastate rates discriminate against interstate commerce by so-called operating ratios and traffic densities of intrastate traffic calculated and resulting from commingling and falsely treating revenues and traffic densities of all interstate traffic that moved to, from or across Utah as comprising a total of intrastate traffic handled within Utah is readily apparent:

Every state in the United States unquestionably has movements by rail of both interstate and intrastate traffic, but if each of the state commissions employed the method used here by the Utah commission of crediting its intrastate rates not only with actual intrastate traffic densities and revenues but also with the revenues and densities of interstate traffic movements that took place within the state, then the end result would necessarily be that the intrastate traffic of the nation and the intrastate rates under which it moves would be credited with producing *all* traffic densities and *all* revenues from all of the traffic — both intrastate and interstate — that moves throughout the country, and there would be no interstate revenues and densities against which to compare those of intrastate traffic. By this fantastic and fallacious method, the intrastate rates could never be found to cause any unjust discrimination against interstate commerce. Thus, the purpose of Section 13 to make the far smaller percentage of intrastate traffic pay its way would be completely subverted, leaving that traffic to move at the expense of the rates upon and revenues produced by interstate traffic.

In the first case decided by this Court after enactment of Section 13 of the Act, *Wisconsin R. R. Comm. v*

C., B. & Q. R. R. Co., 257 U. S. 563, this situation was thoroughly comprehended and disposed of by the following language at pages 585-586:

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. * * *"

The true and correct Utah actual intrastate revenue, the revenue from interstate traffic apportioned to Utah as required by and reported to the Utah commission, the Utah intrastate density (in proportion to intrastate revenue) and the "system" traffic density of the Union Pacific for the four years used in Exhibit No. 34 are:

REVENUE

	Actual Utah Intrastate	Apportioned Utah Interstate	Total—Intrastate and Interstate
1950	$ 6,809,608	$ 34,619,115	$ 41,428,783
%	16.44	83.56	100
1951	$ 6,939,322	$ 40,755,775	$ 47,695,097
%	14.55	85.45	100
1952	$ 6,647,369	$ 39,713,965	$ 46,361,334
%	14.34	85.66	100
1953	$ 8,732,091	$ 42,511,466	$ 51,243,557
%	17.04	82.96	100
Total 4 yrs.	$29,128,390	$157,600,381	$186,728,771
%	15.60	84.40	100

DENSITY (Net Ton Miles)

	Utah intrastate	Union Pacific "system"
1950	490,105	3,112,735
1951	532,222	3,526,004
1952	530,017	3,424,796
1953	772,269	3,474,790

Further demonstrating the fallacy in the Utah commission's compilation and use of its false-named "intrastate statistics," and the acceptance thereof in the majority opinion, the claimed Utah density (ton miles of traffic per mile of main road) would give Utah intrastate traffic credit for the entire density or *all* net ton miles per mile of road for both intrastate and interstate traffic moved in, to, from and across Utah in 1953. The Utah commission has claimed, and the majority of this Court has agreed, that the traffic density figures go far toward proving that the intrastate rates do not discriminate against interstate commerce because in the four years used in Exhibit 64 the combined total interstate and intrastate net ton miles moved in Utah was greater

than the Union Pacific system density or net ton miles in a ratio of about 4 to 3. Aside from the vitiating defect that the claimed Utah intrastate density includes all interstate net ton miles moved in Utah, the further fallacy is found in the fact, shown by figures in the table on page 13, that the claimed higher density of Utah intrastate traffic produced actual intrastate revenue in a ratio of less than 1 to 5, compared to the apportioned interstate traffic that moved in Utah.

It is plain, we submit, that the majority of the Court was misled by or did not fully comprehend the falsity of the mis-named intrastate density figures relied on by Utah or the fantastically false and incongruous results produced by application of them.

If the Court now refuses to rehear this case and correct the majority opinion by rejecting, as did the Interstate Commerce Commission, the Utah commission's false "statistics," and sustaining the validity of the Commission's order, then, of a certainty, in view of their continuing efforts to defeat the purposes of Section 13 of the Act, intransigeant State commissions will seize upon the methods here employed by the Utah commission, and their objective to prevent intrastate traffic from paying its way will have been accomplished.

II.

The Majority Opinion Departs From and is Contrary to the Decisions of This Court Sustaining Section 13 Orders of the Commission for 35 years, and Directly Conflicts With the Action of the Court in No. 861, NORTH WESTERN-HANNA FUEL CO. V. U. S., ET AL., (on the Same day the Majority Opinion was Announced in the Instant Case) Affirming, PER CURIAM, a Judgment of a Three-Judge District Court Sustaining a Section 13 Order of the Commission Based Upon Evidence Identical in Nature and Substantiality to the Evidence in the Instant Case.

The majority holds the Commission's order invalid because, as stated in the opinion, "[w]e do not believe that the evidence here met the exacting standards required by our prior cases." The only deficiencies in the evidence pointed out in the majority opinion are:

> 1. "* * * we discover no positive evidence to indicate that the relative cost of intrastate traffic was as great as that of interstate shipments. The absence of such evidence is important * * *"
>
> 2. "As to the finding that intrastate conditions were *not* more favorable than those incident to interstate transportation, the railroad evidence on this point was far from substantial. In essence, it merely showed that intrastate and interstate traffic was handled by the same crews and intermingled in the same movement. This evidence failed to establish that all material factors bearing on the reasonableness of rates were substantially the same. As we have previously noted, appellants offered convincing evidence not only of greater density on intrastate operations, permitting a wider spread of fixed costs, but also of lower operating ratios and higher returns as the percentage of intrastate traffic in-

creased. In the face of this proof the evidence as to general similarity of conditions falls short of the 'high standard of certainty' required."

Discussing these holdings in their order:

1. To the extent it relies upon the absence of "positive evidence to indicate that the relative cost of intrastate traffic was as great as that of interstate shipments," the majority opinion is directly opposed to decisions of this Court sustaining Section 13 orders of the Commission for 35 years without any evidence of such costs, and to the following decisions of this Court expressly holding that such cost evidence is not essential to the validity of a Section 13 order; *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 587-588; *Illinois Commerce Commission v. United States*, 292 U. S. 474, 483-484, citing *United States v. Louisiana*, 290 U. S. 70 and *Florida v. United States*, 292 U. S. 1; *King v. United States*, 344 U. S. 254, 273.

Indeed, no prior decision of this Court can be found holding or even implying that evidence showing the relative cost of handling intrastate and interstate traffic is necessary to support an order of the Commission under Section 13 of the Act. If now, for the first time, the majority intends to lay down the rule that the Commission can not make a valid state-wide revenue order under Section 13 in the absence of positive evidence of the relative cost of handling intrastate and interstate traffic, then all of such orders issued by the Commission in the past without evidence of such relative costs were invalid, and decisions of this Court sustaining them were wrong.

In its administration of Section 13 since 1920, the Commission has always held that cost evidence is not necessary to a valid order under that section, and has repeatedly rejected contentions of State commissions to the contrary. See *Alabama Intrastate Fares*, 1948, 273 I.C.C. 627, 635-637; *Increases in Alabama Freight Rates and Charges*, 274 I.C.C. 439, 463; *Utah Intrastate Freight Rates and Charges*, 287 I.C.C. 315, 321; and *Minnesota Intrastate Freight Rates and Charges*, 300 I.C.C. 201. (Judgment of three-judge district court sustaining that order was affirmed, *Per Curiam*, by this Court, No. 861, *North Western-Hanna Fuel Co. v. United States*, the same day the majority rendered its decision in the instant case.) The Commission's report in that case states, 300 I. C. C. 222-223:

> "* * * [i]n numerous more recent decisions, both by lower courts and by the Supreme Court, it has been held that to impose on this Commission the duty of separating property used in the two services when so much of it is used in both would be to assign it a well-nigh impossible task. *Wisconsin R. Comm. v. Chicago, B & Q. R. Co.*, 257 U. S. 563, 588. In *Florida v. United States*, 292 U. S. 1, 9, Chief Justice Hughes, who wrote the opinion in *Minnesota Rate Cases, supra*, said:
>
> > 'The requirement of essential findings as to revenues did not demand an impractical exactness. Losses through inadequate rates could be shown satisfactorily even though proof of the precise extent of such losses was not available. Reasonable determinations were required and these were made.'
>
> "In *Illinois Commerce Comm. v. United States*, 292 U. S. 474, at page 483, the Court said:

> 'Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues.'
>
> "In *State of Montana v. United States*, 106 F. Supp. 778, 781, the court rejected the contention made on behalf of the State that the evidence was insufficient to support the order of this Commission because of the failure to segregate and prove separately the costs and revenues of the intrastate traffic, and this finding was referred to with approval by the Supreme Court in *King v. United States*, 344 U. S. 254."

This Court has consistently held that long interpretation by the Commission in its administration of a provision of the Act will be given great weight, and will not be disturbed by the courts unless clearly wrong, *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 280.

In the *Wisconsin* case, *supra*, this Court held at page 588:

> "* * * [t]o impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not."

If the majority opinion is intended now to reverse the time-worn position of the Commission and this Court

and burden the railroads and the Commission with the "well-nigh impossible task" of attempting to make such cost separations in future Section 13 proceedings then we suggest that it should not leave its intent in doubt but should be clear and explicit so that relief from such burdensome, unnecessary and impossible task might be sought at the hands of Congress.

2. In holding that the evidence here did not meet "the exacting standards required by our prior cases," the majority opinion says that when Federal power is exerted to remove an undue burden caused by low interstate rates against interstate commerce, "proof of such must meet 'a high standard of certainty,'" citing *Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493, 510. But that case did not concern the adequacy, substantiality or certainty of "proof" required to support a Commission order superseding state authority over intrastate rates. Indeed, the decision does not, as there was not a remote reason, even to mention evidence or "proof." The sole question in the case arose because the parties differed widely about "the scope of the order," the carriers asserting that the order was state-wide and required that every intrastate passenger rate in Illinois be increased, while the State authorities claimed the order was not state-wide, and that "the extent to which it is intended to affect the state-made rates is so indefinitely and vaguely stated as to make it inoperative and of no effect as to them" (page 507). The Court said that as the intent of an act of Congress to supersede State power must be "clearly manifested," so, "an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute, otherwise valid, unless, and

except so far as, it conforms to a high standard of certainty," and concluded that "the uncertainty in this order is such as to render it inoperative and of no effect as to the intrastate rates * * *" (page 510).

Thus, the majority opinion here clearly mis-cites and misapplies the *Illinois Central* decision* and we respectfully suggest that the majority's oversight in failing to notice that it was an *order* superseding state rates and not the "proof" to support such order, which that decision held, must meet a "high standard of certainty," might have caused it to depart from the Court's long-standing rules governing evidential support for the Commission's Section 13 orders, and to lay down for the first time the rigid requirement that "proof" to support those orders "must" meet a "high standard of certainty."

Moreover, the cited *Illinois Central* case was decided two years before the enactment of Sections 13(3) and (4) and 15a of the Act placing upon the Interstate Commerce Commission for the first time the duty, in the exercise of its rate making powers, to provide revenues sufficient to enable the carriers to maintain an adequate railway transportation system and, to that end, to see to it that intrastate traffic contributes its fair share of such needed revenue and that this purpose of Congress shall not be defeated by state railway commissions.

This Court in many decisions has made it plain that the Commission, being an administrative tribunal

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* The decision was correctly cited in *North Carolina v. United States*, 325 U. S. 507, not as laying down a rule governing the quality of "proof" but as authority for the statement at page 511, that "orders giving precedence to federal rates must meet 'a high standard of certainty'."

and not a court, "is not hampered by mechanical rules governing the weight or effect of evidence," *Western Chem. Co. v. United States*, 271 U. S. 268, 271, and, specifically interpreting the Commission's power over intrastate rates under Section 13 and its duty under Section 15a to provide revenues needed to maintain an adequate national transportation system, this Court, far from laying down "exacting standards" for evidence or a "high standard of certainty" in the "proof" that intrastate rates unduly burden interstate commerce, has repeatedly and consistently held that those sections of the Act shall not be interpreted as imposing requirements regarding proof and findings so onerous as to prevent effective administration and enforcement of them. *Wisconsin R. R. Comm. v. C. B. & Q. R. R.*, 257 U. S. 563, 588; *United States v. Louisiana*, 290 U. S. 70, 75-76, 78-79; *Florida v. United States*, 292 U. S. 1, 9; *Illinois Commerce Commission v. United States*, 292 U. S. 474, 483; *King v. United States*, 344 U. S. 254, 275.

The evidence in this case follows the same pattern, covers the elements and factors, and, indeed, is practically identical to the evidence supporting all Section 13 orders sustained by this Court for 35 years. We find no previous case in which this Court has set aside a Section 13 order on the ground that the evidence was not "substantial." Compare *Mississippi Public Service Com'n v. United States*, 124 F. Supp. 809, affirmed on motion, without opinion, 349 U. S. 908.

In no decision dealing with Section 13 has this Court held, as the majority now holds, that "proof" that intrastate rates cast an undue burden on interstate commerce "must meet 'a high standard of certainty,'" or

"exacting standards." Not one of the decisions holds or implies that evidence to support a Section 13 order must show the relative cost of handling intrastate and interstate traffic; indeed, all of the decisions touching on the subject of costs hold that such showing is not required. Not one of the decisions of this Court sustaining orders under Section 13 of the Act holds that evidence comparing intrastate with "system" operating ratios and traffic densities is necessary to support a Section 13 order, or that a mere showing of a lower intrastate operating ratio or a higher intrastate traffic density is decisive, and is enough to outweigh voluminous evidence of the nature disclosed by the Commission's report in the instant case, to say nothing of the weight or probative effect of such operating ratios or traffic densities when those for the state take credit not only for intrastate traffic but all interstate traffic that moves to, from or across the state.

The majority opinion rejects as being "far from substantial" undisputed evidence admitted by appellants as fully supporting the following statement of fact by the Commission (R. 100):

> "* * * intrastate traffic handled within Utah and interstate traffic to or through points in that State are handled in the same trains by the same crews and other employees, and through the same yards and other facilities. No distinction is made between intrastate and interstate traffic in the loading, unloading, and line-haul movement."

This is the first time any decision of this Court has questioned the substantiality of such facts to prove that intrastate and interstate traffic are handled under substantially similar conditions, and the majority's hold-

ing is directly in the teeth of numerous decisions explicitly accepting such facts as substantial and sufficient evidence to prove that conditions under which intrastate traffic is handled are not more favorable than those under which interstate traffic is handled. Among the unbroken line of decisions by this Court are:

Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co., 257 U. S. 563, 588 (this was the first decision by this Court sustaining an order of the Commission under Section 13);

New York v. United States, 257 U. S. 591, 600 (citing the *Wisconsin* case);

United States v. Louisiana, 290 U. S. 70, 79;

Florida v. United States, 292 U. S. 1, quoting the Commission's finding at page 11 and holding that "there was no lack of substantial evidence to support the Commission's finding" at page 13;

Illinois Commerce Comm. v. United States, 292 U. S. 474, 483, 485;

King v. United States, 344 U. S. 254, 271-272.

The majority's rejection, as "far from substantial," the evidence in the instant case showing the intermingled and identical handling of Utah intrastate traffic and interstate traffic is all the more shocking and incomprehensible in view of the fact that on the same day (May 19, 1958) the majority opinion was announced, the Court affirmed *per curiam* the judgment of the three-judge district court for Minnesota in No. 861, *North Western-Hanna Fuel Co. v. U. S.*, which sustained the Commission's order under Section 13 in *Minnesota Intrastate Freight Rates and Charges*, 300 I.C.C. 201 (involving the

same Ex Parte 175 increases that are involved in Utah in the instant case), in which the Commission's findings were upon evidence identical to that rejected by the majority in the instant case. At page 205 the report states:

> "Interstate and intrastate traffic are commingled, are transported in the same trains over the same tracks, and are handled through the same stations by the same station personnel. From an operating standpoint, therefore, there is no difference between these classes of traffic. * * *"

And at page 207:

> "* * * [t]he evidence is convincing that the unit cost of transporting intrastate traffic in Minnesota is not less than, and in some instances is greater than, the unit cost of transporting interstate traffic."

The evidence so relied upon by the Commission was held by the district court as sufficiently substantial to support the finding that transportation conditions incident to rail intrastate transportation in Minnesota were not more favorable than rail interstate transportation (see opinion printed as Appendix A to jurisdictional statement, page 42, in No. 861, October Term, 1957, in this Court.)

This Court's affirmance of the district court's judgment in that case, holding that evidence proving the intermingled and identical handling of interstate and intrastate traffic was substantial and the majority's opinion on the same day rejecting identical evidence as being "far from substantial" naturally leaves unanswered the questions: What is the law in this Court with respect to the substantiality of such evidence? Is the identical evidence sufficiently substantial in Minnesota but "far

from substantial" in Utah? What will be the status of the same type of evidence in other Section 13 cases which are on their way to this Court?

The majority opinion states that "this evidence failed to establish that all material factors bearing on the reasonableness of rates were substantially the same." Presumably, this was adopted from appellants' brief in this Court, citing, at page 14, *Illinois Commerce Commission v. United States*, 292 U. S. 474. But this Court's decision in that case (pages 483-485) clearly holds that evidence showing that movements of interstate and intrastate traffic are "intimately bound together" is sufficient to prove that the conditions under which the two classes of traffic are handled are "substantially the same with respect to all factors bearing on the reasonableness of the rate" for, at page 485, the Court held:

> "* * * [t]he effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions * * *".

Moreover, while the "reasonableness" of the switching rates for the service performed was at issue before the Commission in that case, the proceeding was not, as here, a general revenue proceeding but was merely for the purpose of removing discrimination caused by intrastate rates against interstate commerce consisting of traffic switched within the Chicago switching district. The instant case is part of a general revenue proceeding for the purpose of providing sufficient revenues to enable the railroads of the country to maintain an adequate transportation system. This Court has held that in a

proceeding under Section 13 "the reasonableness *per se* of intrastate rates" is not an issue but that "the question is that of the relation of rates to income", *Florida v. United States*, 282 U. S. 194, 214. This Court has never held that in a Section 13 case the Commission must have before it evidence covering all factors bearing on the "reasonableness" of intrastate rates, and no doubt for the good reason stated in the *Florida* case that the "reasonableness *per se*" of intrastate rates lay with the state authorities and not with the Commission.

In view of the fact pointed out at pages 74-75 of the railroads' brief filed with this Court in the instant case that there are probably several hundred "factors" having a bearing upon reasonableness *per se* of rates in particular cases, we can not believe that the reference by the majority opinion in this case to "all material factors bearing on the reasonableness of rates" was intended to reverse all prior holdings by this Court and establish an entire new rule of evidence for proceedings before the Commission under Section 13 of the Act, but the doubt cast upon the situation by the majority's opinion leaves uncertainty which should be cleared away by explicit statement by the Court upon rehearing.

We respectfully observe that, although the majority opinion seems to hold that the order is invalid because the evidence upon which the Commission relied lacks substantiality, it is plain that the majority did not stop there. Instead, it clearly went on to disagree with the Commission concerning the probability of the evidence which the Commission rejected and to make its own findings from that evidence. Thus, the majority not only rejected the Commission's own appraisal and evaluation of the evi-

dence but usurped that exclusive administrative function of the Commission by proceeding to weigh and evaluate the evidence and make its own findings therefrom and nullify the order upon the findings it so made. In doing so the majority departed from and violated this Court's rule to which it has heretofore consistently adhered for half a century, that "[t]o consider the weight of the evidence before the Commission * * * is beyond our province." *Virginian Ry. v. United States*, 272 U. S. 658, 663. Indeed, no principle or rule laid down by this Court in connection with judicial review of administrative orders has been reiterated more often or adhered to more consistently than its rule that the weight of the evidence and the conclusions to be drawn from it is for the Commission and not for the courts. See *New York v. United States*, 331 U. S. 284, 326, 328, 331, 349; *Warehouse Co. v. United States*, 283 U. S. 501, 508. And, "in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission," because of its "knowledge of conditions, of environment and of transportation relations," *Illinois Cent. &c. R. R. v. Inter. Com. Comm.*, 206 U. S. 441, 454.

The wisdom of that salutary rule and the unwisdom and danger of departing from it are demonstrated by the fact that, while this Court has always disclaimed any administrative expertise or technical knowledge in specialized fields, nevertheless the majority here made its own findings and nullified the Commission's order upon the very evidence which the Commission rejected in the exercise of its own technical knowledge of and long experience in prescribing accounting rules and statistical formulae for railroads, and in appraising and evaluating the correctness, soundness and probative effect of statistical data.

Surely, the majority will want to correct the impression, inescapable from its opinion, that the Court at this late day reverses, or would be construed as reversing its time-worn rule that the courts may not usurp the Commission's administrative function and prerogative by weighing, evaluating and making its own findings from the evidence.

III.

In Noting an Absence of any Findings by the Commission Concerning Revenues Derived From or the Conditions Incident to Intrastate Passenger Operations and in Holding That "the Findings Must Reflect Consideration of These Factors in Arriving at a General Intrastate Freight Level", the Majority Decision is Directly Opposed to the Action of the Court on the Same day Affirming PER CURIAM in No. 861, NORTH WESTERN-HANNA FUEL CO. V. UNITED STATES, the Judgment of a Three-Judge Court Sustaining a Section 13 Order of the Commission Which Contained no Findings or any Reference to Intrastate Passenger Operations, and in This Respect the Majority Decision is Directly Contrary to Every Decision of This Court Sustaining a Section 13 Order of the Commission, Except Possibly the MILWAUKEE COMMUTER Case.

Despite the fact that there was no contention before the Commission that Utah intrastate passenger fares burdened or discriminated against interstate commerce, the majority holds that "the findings must reflect consideration of these factors in arriving at a general freight rate level."

No decision of this Court under Section 13 of the Act prior to the recent decision in *Chicago, M., St. P. and P. R. Co. v. Illinois*, 355 U. S. 300, can be found holding or

even suggesting that the Commission can not make a lawful order under Section 13 with respect to intrastate passenger rates without considering intrastate freight operations or vice versa. Indeed, no prior decision of this Court can be found in which the Commission's Section 13 order concerned both passenger and freight intrastate rates. The first two cases decided by this Court under Section 13 concerned intrastate passenger fares and did not concern intrastate freight rates or the "totality" of intrastate operations. The Court sustained the orders without making even a suggestion concerning the necessity of findings concerning freight revenues or freight operations. *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563; *New York v. United States*, 257 U. S. 591. The numerous cases cited and analyzed in the dissenting opinion in this case show indisputably that Section 13 orders of the Commission, consistently sustained by this Court, involved either intrastate freight rates or intrastate passenger fares, but not both in the same case, and in many of the cases the orders concerning only intrastate freight rates were not statewide but dealt only with rates on individual commodities. For example, in *Florida v. United States*, 282 U. S. 194 and 292 U. S. 1, the order dealt only with intrastate freight rates on logs hauled by one railroad; in *Alabama v. United States*, 283 U. S. 776, only the intrastate rates on fertilizer and fertilizer materials were involved; the Section 13 order sustained in *Ohio v. United States*, 292 U. S. 498, concerned only the intrastate rates on bituminous coal from limited mining districts in eastern and southern Ohio to destinations in the northeastern portion of the state.

Thus, this Court's decision in the *Milwaukee Commuter* case was directly in the teeth of all prior decisions

by this Court involving Section 13 orders, although the opinion in that case made no commitment as to whether it should be taken as a reversal of evidential and procedural requirements implicitly sustained in all other decisions of the Court involving Section 13 orders concerning either intrastate freight or passenger operations, but not both in the same order. And, while the decision in that case merely held that commuter fares could not be dealt with under Section 13 without considering the "totality" of the Milwaukee's Illinois intrasfate passenger and freight operations, even though no statewide order or general revenue needs were involved, the majority decision in the instant case now turns the *Milwaukee Commuter* decision around and uses it as authority to require findings covering passenger operations in a general revenue case involving only freight rates, and to reverse all prior decisions of this Court so as to make essential in each Section 13 freight rate case the submission of evidence, and consideration and findings by the Commission concerning intrastate *passenger* operations, as well as intrastate freight operations. Yet, on the same day the majority in the instant case announced its decision, the full Court in No. 861, *North Western-Hanna Fuel Co. v. U. S., et al.*, affirmed the judgment of the three-judge district court of Minnesota which, in turn, sustained the validity of a Section 13 order involving only intrastate freight rates and charges, and not a word of evidence or any finding concerning passenger operations. *Minnesota Intrastate Freight Rates and Charges*, 300 I. C. C. 201.

The confusing and inconsistent result of all this is that the railroads and the Commission are left not merely in doubt and uncertainty but without any way of knowing

what the law in this Court is on this point. We can not know whether the law in this Court is that which was implicit in all decisions, prior to the *Milwaukee Commuter* case, sustaining Section 13 orders concerning exclusively either with intrastate freight rates or intrastate passenger fares, but not both; or, whether the law is that announced in the *Milwaukee Commuter* case, that no intrastate passenger fare can be dealt with under Section 13 without dealing with the "totality" of all freight and passenger operations within the state; or, whether the law is that laid down in the majority decision in the instant case, that a statewide order concerning freight rates alone can not be made by the Commission unless its findings reflect consideration of revenues and conditions incident to both freight and passenger operations within the same state; or, whether the law that is implicit in the Court's *per curiam* action, on the same day the majority decision in this case was announced, affirming the district court's judgment in the *North Western-Hanna Fuel* case, which sustained the validity of a Section 13 order concerning only intrastate freight rates and charges in Minnesota without any consideration by the Commission of intrastate passenger operations. The railroads and the Commission will be "hampered", indeed, in the presentation and decision of future Section 13 cases if the Court refuses to rehear this case and, once and for all, make the law clear on this point.

CONCLUSION

The majority opinion accepts and relies upon the Utah commission's false formula for testing the validity of its intrastate rates under Section 13 of the Act by crediting them with the production of the revenues not only from Utah intrastate traffic but also an apportion-

ment of revenues admittedly produced by all interstate traffic moved to, from and across Utah. As the apportioned revenues from interstate traffic generally exceed by several times (five times in Utah) the actual revenue produced by intrastate rates, by applying such a false formula every state in the United States could always make a showing that its intrastate rates contribute several times the actual revenues derived from them, with the result intrastate rates could never be found to unduly burden or discriminate against interstate commerce. Thus, unless the majority decision is corrected, intransigeant state commissions will have finally found a method of accomplishing their persistent purpose to defeat the intent of Section 13 by preventing intrastate traffic from contributing reasonably to the revenues necessary to provide a national railroad transportation system. For this and other reasons discussed above, these petitioners earnestly pray that the Court rehear, reconsider and correct the majority opinion in this case.

Respectfully submitted,

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June, 1958

CERTIFICATE OF COUNSEL

I hereby certify that this petition is presented in good faith and not for delay.

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PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for railroad petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 9th day of June, 1958, I served, on behalf of all railroad petitioners herein, copies of the foregoing petition for rehearing on the adverse parties herein, as follows:

1. On the Public Service Commission of Utah by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

E. R. Callister, Esq.
Attorney General of Utah
Salt Lake City, Utah

Keith Sohm, Esq.
Commerce Attorney for Utah Public Service Commission
State Capitol
Salt Lake City, Utah

2. On the Utah Citizens Rate Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Calvin L. Rampton, Esq.
721 Continental Bank Building
Salt Lake City, Utah

3. Also on the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Victor R. Hansen, Esq.
Assistant Attorney General
Department of Justice
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A. Pratt Kesler, Esq.
United States Attorney for the District of Utah
Room 200, Federal Building
Salt Lake City, Utah

4. Also on the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert W. Ginnane, Esq.
General Counsel
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